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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 24

FEDERAL TRADE COMMISSION, *Petitioner*,

vs.

STANDARD OIL COMPANY, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICI CURIAE

FOR

EMPIRE STATE PETROLEUM ASSOCIATION

WILLIAM SIMON
ROBERT L. WALD
JOHN BODNER, JR.
1300 Connecticut Avenue
Washington, D. C.

Attorneys for Empire State Petroleum Association

NATIONAL OIL JOBBERS ASSOCIATION, INC., AND MEMBER ASSOCIATIONS IN APPENDIX A

OTIS H. ELLIS
1001 Connecticut Avenue
Washington, D. C.

Attorney for National Oil Jobbers Association and Member Associations

October 1957

INDEX

	Page
Interest of Amici Curiae	1
1. Statement of the Case	4
2. The Economic Function Performed by Jobbers in Gasoline Distribution	5
Argument	
I. The Commission's decision disregards the wholesale function in gasoline distribution, encourages elimination of independent jobbers and will not help retailers	8
II. The Commission refuses to follow this Court's 1951 decision. It now adopts a theory unsupported by its own findings, contrary to the undisputed facts, and in conflict with the law as stated by this Court	16
A. The Commission's historical opposition to the views expressed in this Court's 1951 decision and its request to Congress to overturn the decision	16
B. The "afterthought" argument of an alleged illegal pricing system of the type condemned in Staley and Cement	17
C. The actual grounds assigned in the Commission's decision for not finding good faith—now relegated to a subsidiary portion of the argument—were all raised and rejected in this Court's prior decision	23
D. The Commission persists in equating normal, hard competition with theoretical "injury" to competition	24
Conclusion	26
Appendix A	28

CITATIONS

CASES: Page

Corn Products Refining Co. v. Federal Trade Commission, 324 U. S. 726 18
Federal Trade Commission v. A. E. Staley Mfg. Co., 324 U. S. 746 ..... 18, 19, 20, 23
Federal Trade Commission v. Cement Institute, 332 U. S. 683 ..... 18, 19, 20
Standard Oil Company v. Federal Trade Commission,
173 F. 2d 210 11
340 U. S. 231 ..... 5, 11, 17, 26
Standard Oil Company v. Federal Trade Commission, 233 F. 2d 649 ..... 17, 20, 23, 24
Standard Oil Company v. United States, 337 U. S. 293 10

STATUTE:

Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, Section 2, 15 U.S.C. 13 ..... 4, 23

ARTICLES:

Adelman, *Integration and Antitrust Policy*, 63 Harv. L. Rev. 27 (1949) 11, 12
Functional Discounts Under the Robinson-Patman Act: The Standard Oil Litigation, 67 Harv. L. Rev. 294 (1953) 8
McGee, *Price Discrimination and Competitive Effects: The Standard Oil of Indiana Case*, 23 U. of Chi. L. Rev. 398 (1956) 19
The Swinging Door—or How to Obey One Antitrust Law by Violating Another, 59 Yale L. J. 158 (1949) 11

OTHER:

Hearings, House Judiciary Committee, 84th Cong., 2d Sess. 17
Hearings, House Judiciary Committee, 82d Cong., 1st Sess. 16
Hearings, House Small Business Committee, 84th Cong., 1st Sess. 21
H. Rep. 2966, 84 Cong., 2d Sess. 2
Letter of FTC Chairman, March 16, 1953 16
Sen. Rep. 293, 82d Cong., 1st Sess. 16

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NATIONAL OIL JOBBERS ASSOCIATION, INC., AND MEMBER ASSOCIATIONS IN APPENDIX A

INTEREST OF AMICI CURIAE

Empire State Petroleum Association, Inc. is a trade association of the independent petroleum jobbers and wholesalers of New York State. The National Oil Jobbers Council, Inc. is a federation of similar state and regional jobber associations; its member groups, who join in this brief, are listed in Appendix A and represent thousands of independent petroleum jobbers.

Empire State has appeared, *amicus curiae*, at all stages in this litigation since 1949. National Oil Jobbers Council

filed a separate brief, *amicus curiae,* in the court below, and several of its members joined Empire State in its brief before this Court in 1951.

These independent petroleum jobbers have a direct and vital interest in the disposition of this proceeding. They oppose the position of the Federal Trade Commission and have done so throughout this proceeding. If the Commission's view prevails, the independent jobber function in gasoline distribution will be seriously jeopardized.

This proceeding was initiated by the Commission seventeen years ago on a complaint filed in 1939 by retail gasoline dealers who appear here, *amici curiae,* in support of the Commission decision.[1] (Their present counsel was formerly the Commission attorney prosecuting the complaint.)[2] These retailers avowedly sought to use the 1936 Robinson-Patman Amendment to the Clayton Act and the 1937 Miller-Tydings Amendment to the Sherman Act, to achieve anti-competitive pricing of the character the antitrust laws were designed to prohibit.[3]

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[1] "Complaints to the FTC in 1939 by the Retail Gasoline Dealers Association of Michigan, among others, led to the Standard (Indiana) case." H. Rep. 2966, 84th Cong., 2d Sess. 167 (1956).

[2] See Retailers Brief, p. 7.

[3] The primary interest of these retailers is retail price fixing. During trial, Standard placed in evidence articles from the Retail Gas Dealers' News, the official journal of amicus Retail Gas Dealers of Michigan. These are typical:

"PREPARE FOR STATE-WIDE STABILITY

Federal Hearing Could "Cinch" Fair Trade for All Michigan Gas Dealers

When will the Federal [Trade Commission] Hearing begin? . . .

The ultimate result will benefit the entire State. With the proper follow-up as contemplated by the Association, all of Michigan will be rid of subsidy and chiseling and the illegitimate children of these ogres—price wars and lost sales."

(Retail Gas Dealers' News, August, 1940, R. 76)

* * * * * * * * * * *

"DEALERS ACCLAIM U. S. ACTION

Simultaneous with the Federal Trade Commission's announce-

The brief of the retailer *amici* is based on the premise that reinstating the Commission's order will achieve (non-competitive) price stability—a premise patently in conflict with national antitrust policy and contrary to the realities of gasoline marketing.

Historically, these retailers have sought to eliminate price competition. Their goal, however, can be accomplished effectively only through the use of "Fair Trade" by all sellers or by a price-fixing conspiracy. It cannot be accomplished through this Federal Trade Commission decision.

Retailers' expectations are accurate only to the extent that they anticipate the Commission's decision will effectively prevent Standard from selling simultaneously to both retailers and jobbers. But it would still not prevent jobbers from *lawfully* buying elsewhere at tank car prices: Many refiners sell gasoline only in tank car quantities at tank car prices. A number of major suppliers, who sell to retailers in some markets, sell only to jobbers in other markets. Still others market gasoline purely on an intrastate basis.

Notwithstanding the retailers' contrary statements, gasoline *is* freely available at the tank car price to any jobber who has the credit and the facilities to buy in tank car quantities. Despite these retailers' hopes for jobber liquidation, jobbers will continue to exercise their (unwelcome) competitive influence on gasoline distribution.

While achieving no benefits for retailers, the Commission's decision would have a harsh impact on jobbers. It would: (a) force jobbers (whose present suppliers also sell

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ment of [complaints against Standard and others] came the news that the Battle-Creek-Kalamazoo area had responded to Association efforts. Market stability had been attained. . . ."

(Retail Gas Dealers' News, January, 1941, R. 87)

* * * * * * * * * * *

"DOOM AT HAND FOR SECRET REBATES

Combination of bright prospects for gasoline dealers: a favorable verdict in the Federal Trade Commission's complaint of price discrimination in Michigan; and passage of . . . the new improved fair trade law."

(Retail Gas Dealers' News, April, 1941, R. 85)

direct to retailers) to shift, at great expense, to other suppliers selling only to jobbers; (b) encourage suppliers to assume the distribution functions formerly performed by their jobbers in order to retain the retail customers of the ex-jobbers; and (c) reduce the number of suppliers competing for jobber business (as suppliers selling retailers abandon sales to jobbers).

1. Statement of the Case.

The Commission complaint, filed November 29, 1940, charged price reductions in the sale of gasoline to four Detroit jobber customers of Standard, resulting in an alleged injury to competition among gasoline retailers, in violation of Section 2(a) of the Robinson-Patman Amendment. Standard previously had lost 3 other jobbers to competitors offering lower prices (R. 1912-1916). This Court has previously noted, and the Commission tacitly concedes, that the price reductions at issue were made to retain those customers, in response to lower prices offered the four buyers by Standard's competitors.

The Commission expressly found that Standard had reason to believe it would lose those customers to competitors offering lower prices if it did not grant the lower prices. *The lawfulness of Standard's competitors' prices stand unchallenged on this record;* the Commission has persistently refused to make any finding as to their legality, despite requests by Standard and these *amici* to do so.

The evidence largely concerned 1936-38 sales of "distress" gasoline in the "demoralized" Detroit area (R. 5116)). The Examiner found the market characterized by "price cutting orgies" (R. 5118). Detroit was a "dumping ground" for surplus gasoline from the Mid-Continent fields. One Commissioner described competition as "dog-eat-dog" (R. 5416).

The market instability was pervasive: this Court found that the competitive effect would have been the same on the retailers whether or not Standard met the competitors' lower prices. But the Commission view here would prohibit a petroleum supplier—whether a major refiner

or a jobber—from retaining a customer by meeting a price that is *already* lawfully available to the buyer from a competing supplier. This rule of law is, of course, applicable to 1957 commercial conduct, although based exclusively on evidence arising out of the depressed mid-30s. It would place independent petroleum jobbers in an ever tightening competitive vise; but it would in no way affect price competition among retailers.

In 1951, this Court held that "meeting competition" was a full defense and remanded the case to the Commission "to make findings *in conformity with the opinion of this Court.*" That decision required the Commission to find "good faith" unless the Commission found the competitors' lower prices unlawful, or produced additional evidence negativing "good faith." Yet the Commission offered no new evidence and declined to find that the competitors' lower prices were unlawful.

2. The Economic Function Performed by Jobbers in Gasoline Distribution.

An understanding of the function of independent jobbers in gasoline distribution is critical to an understanding of the impact this case will have on those jobbers.

Gasoline for motor vehicles originates in a "refinery" and is pumped ultimately from underground tanks in a retail service station into the gasoline tanks of vehicles. In simplest terms this case is about how gasoline gets from the refinery to the retailer's tank.

A retailer owns or leases his service station. Gasoline is delivered to his station in trucks called "tank wagons."[4] The storage capacity of a service station is limited. Frequent deliveries of gasoline are necessary to meet the demand. Tank wagon trucks delivering this gasoline may be owned by the supplier-refiner, in which case they are supplied out of the refiner's own storage facilities, or they may be owned and operated by an inde-

[4] 700 to 800 gallons was the average tank-wagon delivery at the time of the hearing; modern tank-wagons are somewhat larger.

pendent gasoline jobber, in which case they are supplied out of storage facilities owned by the jobber.

The jobber fulfills the intermediary distribution functions which the supplier would otherwise have to perform himself if he were to deliver directly to retailers. A jobber must own a "bulk plant" for storage of large quantities of gasoline shipped to him either directly from the refinery or from a storage terminal maintained by the refiner. The jobber is supplied in "tank-car" quantities or greater. A tank-car shipment, ordinarily 8,000 to 12,000 gallons, is many times larger than a tank-wagon shipment. Jobbers may receive deliveries, as well, by barge (20,000 barrels of 42 gallons each) or even by oil tanker (125,000 42-gallon barrels). Jobbers are also supplied by pipeline.

Jobbers function principally to maintain an even, continuing flow of distribution at the local level. They operate fleets of trucks for local deliveries to service stations and maintain bulk storage facilities to receive large-scale shipments of gasoline. The maintenance of adequate jobber facilities requires a large capital investment, and jobbers frequently extend a line of credit to their service station customers and finance all or a part of the local advertising of their products.

The evolution of independent gasoline jobbers is a typical story of American enterprise. Most gasoline jobbers start out as retailers. After nurturing one profitable service station, a dealer may acquire a second, a third, and more stations. He may, in time, acquire volume commercial accounts. Small retailers may purchase their gasoline requirements through him. With growth his total volume of business may expand to a point where it is prudent for him to invest in a bulk plant and in tank-wagon distribution facilities. At this point he becomes, in physical terms, a jobber as well as a retailer, meaning that he is capable of performing intermediary wholesale functions of storage and distribution between refiner and retailer. When he attains this status, gasoline is freely available to him from many sources in the industry at a jobber or tank-car price.

This growth from retailer to jobber is, in fact, the actual history of most gasoline jobbers. Few jobbers enter into business full-grown. Almost inevitably, the emergence of a jobber is through his former identity as a retailer. But it would be impossible for a retailer, however efficient and aggressive, to expand his operations and become a jobber if he were compelled, at that point where he first undertakes jobber functions, to abandon his retail operations.

Once established, jobbers prefer not to operate retail stations; generally they lease their stations to other operators. This tendency is confirmed by the record in this case which shows that, after 1936, Wayne, Stikeman, and Citrin-Kolb (3 of the 4 buyers whose purchases are here at issue) sold only from 0.3% to 15.4% of their gasoline purchases at retail. After 1938, Stikeman abandoned all retail selling, and by the time the Commission's complaint issued herein in 1940, Wayne and Citrin-Kolb had limited retail operations to those temporary periods when one or more of their stations were without a lessee.

ARGUMENT

I

THE COMMISSION'S DECISION DISREGARDS THE WHOLESALE FUNCTION IN GASOLINE DISTRIBUTION, ENCOURAGES ELIMINATION OF INDEPENDENT JOBBERS AND WILL NOT HELP RETAILERS.

The immediate impact of the Commission's decision will be felt primarily by gasoline jobbers, not by Standard.[5] It will have no effect upon competition among retailers. The Commission's decision, through circumvention, achieves precisely the same anti-competitive result rejected by this Court in 1951. If validated, the Commission's theory will drive many jobbers from business, will compel numbers of surviving jobbers to shift suppliers at great loss, will drastically weaken competition among suppliers for jobber business, and will spur displacement of independent jobbers by the major oil companies themselves.

This threat to jobbers was recognized during oral argument before this Court in the prior appeal. Mr. Justice Black said to Commission counsel: "Are you attacking the wholesale system and trying to put the wholesalers out of business . . . from what you have just said in your answer to the question of Justice Frankfurter it sounds like you are . . ."[6]

The threat remains.

The Commission and the retailer *amici* ignore the jobber function. They consistently describe the tank car price as a "quantity discount" or the "allowance of an unearned discount." They treat the issues here as though there were no distinction between a refiner's tank car deliveries to a jobber's bulk plant and its tank wagon deliveries to a retailer's service station pumps. (See, *e.g.*, Retailers Brief, pp. 34-5). They assume that the performance of wholesaling distribution functions cost the jobber nothing.

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[5] See generally, *Functional Discounts under the Robinson-Patman Act: The Standard Oil Litigation*, 67 Harv. L. Rev. 294, 312-317 (1953).

[6] Transcript of Oral Argument, pp. 101-102.

Yet the Commission found, as did this Court in 1951, that each of the customers whose purchases are here at issue maintained its own bulk plant, had fleets of tank wagons for local service station distribution, and had sufficient credit responsibility and physical facilities for wholesale operations. The trial examiner and the Commission both found that these customers would be granted a lower tank-car price by many suppliers.

The future of the independent jobber is at best uncertain. The weight of capital investment to establish a going concern is heavy. Jobbers of major-brand gasoline must invest heavily in the brand name of their supplier. They frequently must build and lease to retailers service stations conforming to an architectural style of the supplier. They must brand their stations and trucks with the colors and mark of the supplier and promote the supplier's brand on signs or billboards.

The jobber level of distribution is fiercely competitive. Jobbers compete not only with other jobbers but also with major suppliers. Not unusually, jobbers are compelled by supplier-competition to furnish pumps, to paint stations, even to pave driveways for service station customers.

The cost of performing the jobber function, plus a fair profit, is substantially equal to the margin between the tank-car and the tank-wagon prices. If the jobber function could be performed for less than this price spread, suppliers would perform it themselves, rather than permit jobbers to do so. This is simple commercial realism. As the retailer *amici* state, the major suppliers are not anxious to sell at lower tank car price, and do not when it is not to their advantage to do so (Retailers Brief, pp. 9-11).

Gasoline jobbers are, inelegantly, the goat of this proceeding. The likely result of an endorsement of the Commission view here will be the decline or outright elimination of the independent jobber function in oil distribution. The logical consequence of the modified decision pressed here by the Commission "favors rather than discourages monopoly" and would bring full circle "the tragic loss to

the nation" foreseen by Mr. Justice Douglas in his dissent in *Standard Oil Company* v. *U. S.*, 337 U.S. 293. His words have an almost uncanny pertinence in 1957:

> "Today there is vigorous competition between the oil companies for the market. That competition has left some room for the survival of the independents. But when this inducement for their survival is taken away, we can expect that the oil companies will move in to supplant them with their own stations. There will still be competition between the oil companies. But there will be a tragic loss to the nation. The small, independent businessman will be supplanted by clerks. The oil companies will command an increasingly larger share of both the wholesale and the retail markets" 337 U.S. at 320-21.

There can be no inducement for the long-range survival of independent jobbers if the Commission's view prevails. As a matter of simple business pragmatics, the Commission's decision inevitably will accelerate the supplanting of independent jobbers by the oil companies themselves.

While the precise terms of the Commission's order may or may not, in a technical sense, be before this Court,[7] it is fundamental that the Court must concern itself with what the Commission seeks to accomplish through its decision. The order to cease and desist embodied in the Commission's 1953 modified findings is the fourth order drafted in the course of this proceeding. Yet, manifestly, it suffers from the same infirmities as its predecessor orders—so roundly censored by courts and commentators alike—and it would most surely have the same debilitating effect upon independent jobber competition as the earlier orders. The fact is that the Commission, so long as it persists in its present course, cannot draw an order which will not gravely injure jobbers.

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[7] The Commission contends that the only matter before this Court is the ruling of the Court of Appeals, and should this Court reverse that decision, it should then remand to the Court of Appeals for the consideration of the appropriateness of the Commission's order (Brief p. 24, n. 10).

The effect of the Commission's order before this Court in 1951 was clearly to sanction the outright purge of jobbers by Standard or else to compel unlawful resale price maintenance. The Court of Appeals, in its 1949 opinion affirming the Commission, stated frankly:

> "To avoid the force of [the order], the petitioner may do one of two things. First, discontinue selling to wholesalers at a price different than that made to retailers. . . .
>
> "Secondly, the petitioner may under the right to choose its customers refuse to sell to wholesalers who sell to retailers below the price the petitioner makes to its own retailers. . . ." (173 F. 2d 210, 217)

It was presumably the restrictiveness of this anti-competitive option which led the dissenting Justices in this Court in 1951 to conclude:

> "We would affirm the decree below, in principal, *even though we should conclude some amendment might be required in the wording of the order*" (340 U.S. at 267).

The conflict of such an order with the basic purposes of other antitrust laws has been seriously attacked.[8]

The Commission's present order, though simplified, is essentially the same as the earlier orders.[9] The changes

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[8] See, e.g., *The Swinging Door—Or How to Obey One Antitrust Law by Violating Another*, 59 Yale L. J. 158 (1949). Adelman, *Integration and Antitrust Policy*, 63 Harv. L. Rev. 27, 72-74 (1949).

[9] The 1953 order bars:

> ". . . selling such gasoline to any retailer thereof at a lower price than to any other retailer who in fact competes with the favored purchaser in the resale of such gasoline to the public ("Retailer" as here used applies to that portion of the business of any purchaser which consists of the retail sale of gasoline to the public.)

and

> ". . . selling such gasoline to any retailer at a price known by respondent to be higher than the price at which any wholesaler-purchaser is reselling such gasoline to any retailer who competes with such direct retailer-customers . . ." (R. 5392)

are semantic only. This fact is frankly conceded by the retailer *amici*. They state:

> "The present order is the equivalent . . . of the Commission's prior order as modified and affirmed by the Court below in 1949. The effect of the two paragraphs is the same, the difference in terminology being only one of emphasis. Both the old and new paragraphs offer Standard the same alternatives for compliance" (Retailers Brief, p. 33).

The Commission's decision would: (1) deny jobbers (of suppliers who also sell to retailers) any compensation for the jobber distribution function they perform on gasoline ultimately resold through a station they operate; (2) compel many jobbers to shift suppliers at great financial loss without countervailing gain to competition, eliminating a major degree of competition among suppliers for jobbers sales; (3) compel unlawful resale price maintenance; and (4) encourage forward vertical integration by the major oil companies:

(1) Under the Commission's decision, the jobber is classified as a "retailer" and must purchase at the retail price all gasoline which he resells at retail, even though he performs all the wholesale distribution functions such as storage and delivery. In effect, *he* is discriminated against, for he must perform those functions himself without compensation.[10] And even if, as a technical matter, the jobber were permitted a lower price in the amount of the *supplier's* cost-savings in marketing through him, the jobber would *still* be discriminated against; he would receive only partial compensation. He would not be entitled to any interest on his investment, or profit, while the supplier would receive a phantom profit on the distributive functions performed by jobbers and a phantom return on the jobber's investment in facilities to perform the function.

Insofar as the Commission would theoretically permit suppliers, who sell to both dual-functioning jobbers and to

[10] See Adelman, op. cit., *supra*, 63.

retailers, to continue selling to the jobbers by segregating that portion of the jobber sales which will be resold at wholesale and apportioning a functional discount thereon, the whole concept of a seller requiring from his customers detailed accountings of what *they* do with their own property after purchase is, like resale price maintenance, totally alien to a system of independent enterprise and lends itself to snooping, deception, control and abuse.

(2) The basic theory of the Commission's case requires jobbers to resell to retailers *only* at Standard's tank-wagon price in order to maintain retail price uniformity. Jobbers cannot competitively accept such restrictions and still compete with other jobbers not similarly restricted. As a simple matter of business survival they must shift to other, unfettered suppliers, thus eliminating their former supplier as a source of supply. This necessarily reduces competition among suppliers for jobber business. And the necessity for jobbers to give up existing suppliers would destroy jobber investments in real estate, pumps, signs and other facilities carrying their supplier's trade banner.

Yet even then, as a practical matter, the Commission's decision would not foreclose jobbers from purchasing elsewhere at a tank-car price. The decision would only succeed in barring Standard's jobbers from preserving their investment in Standard's trade name and good will, and would compel them to shift to other suppliers at great physical burden and financial sacrifice.

(3) The sharpest criticism leveled at the Commission's early decision was that it would force Standard to engage in resale price maintenance if it were to continue selling to jobbers at all. The earlier order required Standard to discontinue selling to any jobber who resold to retailers below the price Standard charged its retail customers. In effect, it would have required each of Standard's jobber customers to maintain Standard's tank wagon price at the risk of being cut off by Standard. The Court of Appeals in 1949 denied that the order would compel resale

price maintenance on the ground that it did not technically require Standard to enter into resale price contracts; but this essentially ostrich-like response drew this comment from Mr. Justice Jackson, during oral argument:[11]

> "If Standard did just what they are ordered to do by this, they certainly would be in danger of prosecution, would they not, if they did it voluntarily without an order? * * * If I was enforcing the Sherman Antitrust Act and I thought they were making provision not to supply anybody who did not maintain their prices, I would give them some trouble. I do not see how the Department of Justice could fail to strike at that sort of a voluntary arrangement as a restraint of trade, holding up prices."

There is no substantive change in the Commission's present decision and order. It requires Standard to charge all of its 358 retail customers the lowest price that any of its four jobber customers may charge to any of their customers. It is difficult to believe that any supplier, with *four* jobber customers, would permit a jobber to depart from the *supplier's* price to its retailers—if the penalty for permitting that independent competitive action was that the supplier be required to reduce *its* price to 358 other customers.

Instead of requiring that the deviating jobber be cut off, as the earlier order did, the present order requires the supplier to reduce its price to all of its customers to meet the lowest price offered by any of the jobber customers. Even more effectively than before it insures that no jobber will resell gasoline at other than the supplier's price to its retailer customers, for the earlier order put the penalty on the jobber and this one puts it on Standard. The order was obviously intended to accomplish just that purpose, for the Commission must know that Standard, as a practical business matter, would not let a jobber reduce his price to so much as one station if doing so required Standard to lower

[11] Transcript of Oral Argument, pp. 88-89.

its price to 358 other customers. Whatever the route followed, the result is the same: resale price fixing.

(4) The Commission's decision invites eventual forward vertical integration by oil suppliers. The alternative to a heavily policed system of jobber surveillance and resale price maintenance, which the Commission would require if Standard continues selling to jobbers, is for Standard to assume the intermediary distributive role of the jobber and in time to cut off jobber sales entirely. While this, on its face, seems a drastic step, it is a development that may reasonably be expected under the Commission's order. The elaborate system of supplier supervision over the sales of dual-functioning jobbers, and the rigid supplier controls which would be required in order to maintain strict price conformity among jobbers would probably prove anathema to any business. Rather than assume this role and risk the hazards of non-compliance, a supplier, such as Standard, would seek to bypass the jobber and sell directly to the jobbers' retail customers.

Added to these pressures are the market restrictions which the order places upon Standard's jobbers themselves which would aid in disintegrating those jobber operations and would leave a distributive vacuum that only the supplier could fill. While this Court has held that Standard can reduce its price in good faith to meet a lower price of a competitor (although the Commission would seek to frustrate that ruling), the Commission would effectively bar Standard's jobber customers from meeting in good faith the lower price of *their* competitors.

There is no practical difference between the Commission's present decision and its earlier decision. Standard must force into price conformity any jobber known by it to be reselling to retailers below the tank-wagon price, or cut him off, without regard to the reasons, however justifiable in legal terms, for the jobber's lower price.

When a supplier cuts off a jobber, it may be assumed that the supplier will move into that gap and seek to retain the jobber's retailer customers by selling directly to them. Even if the jobber then finds a new supplier he

will have to develop an entirely new retailer clientele in the face of aggressive, tightly-entrenched jobber and supplier competition.

II

THE COMMISSION REFUSES TO FOLLOW THIS COURT'S 1951 DECISION. IT NOW ADOPTS A THEORY UNSUPPORTED BY ITS OWN FINDINGS, CONTRARY TO THE UNDISPUTED FACTS, AND IN CONFLICT WITH THE LAW AS STATED BY THIS COURT.

A. The Commission's Historical Opposition to the Views Expressed in This Court's 1951 Decision and Its Request to Congress to Overturn the Decision.

This appeal represents the final attempt of the Commission to reach the result repudiated by this Court in 1951. The Commission's unrelenting position can best be understood in the light of its own public statements.

Unwilling to accept this Court's holding, the Commission majority (Commissioner Mason dissenting) in April, 1951 urged Congress to overturn the decision. The *Standard* decision, the Commission's chairman wrote, "reaffirmed the good-faith proviso as a complete defense regardless of the effects which may flow from discrimination" and, he said, "raises the anomaly of monopoly power being permitted to use the same weapons to maintain itself which are denied to others for fear of creating a monopoly."[12] In June 1951, another Commissioner, spokesman for the majority, again bitterly assailed the decision, before the House Judiciary Committee and urged nullifying legislation.[13]

In that context of strident philosophical opposition to the Court's decision the Commission, on remand, made its modified 1953 findings (two Commissioners dissenting). Two months later, in a letter to the Senate Judiciary Committee (the Commissioners who dissented from the modi-

[12] Letter of FTC Chairman Mead, April 18, 1951, Sen. Rep. 293, 82d Cong., 1st Sess. 7 (1951).

[13] Testimony of FTC Commissioner Spingarn, Hearings before Subcommittee on Monopoly Power, House Judiciary Committee, 82d Cong., 1st Sess. 21 (1951).

fied findings also dissenting), the Commission Chairman wrote:[14]

> "The present law, as interpreted by the majority decision of the Supreme Court in the Standard Oil of Indiana case (340 U.S. 231) is in the opinion of the Commission too weak to meet the problem to which the Robinson-Patman Amendment was originally addressed."

Again, on April 19, 1956, speaking for a majority of the Commissioners before the House Judiciary Committee, a member of the Commission said:[15]

> "H. R. 11 would largely overturn the *Standard Oil of Indiana* decision. This would remove the grave potentialities for an impaired antitrust policy that are inherent in the Standard Oil holding, by reinstating the original concept of the Robinson-Patman Act. . . .
>
> *"I am frank to admit that I believe the Supreme Court's holding in Standard Oil of Indiana to have been founded on a misapprehension* of the legislative purpose behind the good-faith proviso and, indeed, behind the Robinson-Patman Act generally." (Emphasis added.)

The decision now under review is not responsive to this Court's 1951 mandate, but to long-held views of a Commission majority which has been, and is, bent on frustrating the directive of this Court.

B. The "Afterthought" Argument of an Alleged Illegal Pricing System of the Type Condemned in Staley and Cement.

In the Court of Appeals, Commission counsel argued, for the first time, that Standard "adhered to a price system in reducing its prices to the four jobbers." The court characterized this argument as an "afterthought" which was "designed to bring the case within the scope of the system condemned by the Supreme Court in the *Staley* and kindred cases." 233 F. 2d 649, 653.

[14] Letter of FTC Chairman Mead to Chairman, Senate Judiciary Committee, March 16, 1953.

[15] Testimony of Commissioner Kern, Hearings before Antitrust Subcommittee, House Judiciary Committee, 84th Cong., 2d Sess. 206 (1956).

This "afterthought" pricing system theory, now the Commission's principal contention in this Court, depends wholly upon the existence of a "price system" of the type condemned in the *Staley* and *Cement* cases.[16] The argument was plainly improvised on appeal to circumvent this Court's 1951 decision. It is now presented to this Court as if it were the *basis* of the Commission's decision and order, although *no mention was made* of either *Staley* or *Cement* in the decision on remand.

The Commission's 1953 silence is understandable: both *Staley* and *Cement* were entirely distinct cases, involving the use of inherently discriminatory pricing systems.

The complaint in *Staley* charged the seller with having mechanically adopted in their entirety not only the lower but also the higher prices of its competitor, Corn Products Refining Company. In a companion case the Commission found, and this Court affirmed, that Corn Products' prices were unlawful.[17]

The complaint in *Cement* charged, and the Commission and this Court found, a conspiracy among *all* producers of cement to use a common multiple basing point system.

In contrast, the complaint in this case charged solely and specifically the granting of a lower price to four named individual customers. There was no charge in the complaint and no finding by the Commission of a pricing *system* or of unlawfulness in competitors' prices.

Nowhere in the complaint, in the Commission's detailed 1945 decision, nor in its modified 1953 findings is the term "pricing system" used in reference either to Standard's or to its competitors' prices. Yet, in its brief in this Court, we find nearly 100 references to "system," "pricing system," and "systematic pricing."

While the *Staley* case was decided by this Court several months prior to the Commission's original 1945 decision, and was the *sole* Supreme Court decision interpreting

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[16] *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945); *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948).

[17] *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726 (1945).

Section 2(b) at that time, the Commission made no reference to *Staley*. And the Commission's modified 1953 decision failed to refer either to *Staley* or to *Cement*—upon which cases the Commission now claims its decision was primarily founded. But the brief of the Commission before this Court abounds with references to the two cases: 43 times to *Staley* and 27 times to *Cement*.

In attempting to bring this case within the doctrine of the basing point decisions, the Commission makes essentially two arguments: *First*, that Standard used a "general pricing system" in granting price concessions to four of its 362 Detroit customers. *Second*, that Standard's price reductions to the four jobbers were made in response to lower prices made by competitors pursuant to their own general pricing systems. Both contentions must fail, for the record conclusively shows that Standard's lower prices to Ned's, Citrin-Kolb, Wayne and Stikeman were made as reductions from a pre-existing uniform price scale and were made in good faith, in individual competitive situations, to meet the equally low prices offered by competitors.[18]

The evidence compels the following conclusions (which the Commission has never contested): that from 1921-1940 Standard's share of the Detroit market gradually declined; that Standard had lost three jobber customers to competitors' lower-price offers; that the price reductions to the four jobbers were made in response to numerous and continuing specific offers from rival companies; that the price reductions were not below the competitors' offers; that if Standard had not granted the price reductions it would have lost the four jobbers; and that the price reductions were granted to retain and not to gain customers.

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[18] See McGee, *Price Discrimination and Competitive Effects: The Standard Oil of Indiana* Case, 23 U. of Chi. L. Rev. 398 (1956). The article reviews all the evidence relating to offers by rival companies to Standard's four jobbers and concludes that "Standard's four remaining jobbers were not passive agents in the process of price-making at the wholesale level. They had to bargain for what they got, and they bargained hard and well. Their supplier was evidently unwilling to give them better terms than it had to give, and it calculated well just what it would take to keep their business" (p. 435).

In short, each of the price reductions made by Standard was in accordance with every requirement of the statutory defense of "meeting competition." Indeed, if anything is remarkable about Standard's use of the defense, it is the fact that it was used so conservatively in view of the competitive activity in the Detroit gasoline market.

According to the Commission's theory, a seller apparently must meet *all* competitive offers, for as soon as he exercises restraint he is, ipso facto, using a discriminatory general pricing system. This assertion is plainly without merit. The court below rightly rejected it, and declared that "a seller must be permitted in the exercise of a sound judgment to determine when and under what circumstances it will reduce its price in order to meet that of a competitor," 233 F. 2d at 654.

The other side of the Commission's pricing system argument is that Standard's price reductions were in response to prices of competitors who themselves were using a pricing system, a practice condemned by this Court's holding in its *Staley* and *Cement* decisions. But the analogy with *Staley* and *Cement* is inapposite, and the Commission's assumption that the prices of other suppliers selling to jobbers in Detroit were unlawful is unwarranted.

The Staley Company, entering the glucose market, adopted *in its entirety* the unlawful basing point system used by the market leader, Corn Products, and then sought to justify the illegal pricing system on the ground that it was simply matching the prices of a competitor. This Court rejected the argument.

Cement reiterated the *Staley* doctrine, holding that the meeting competition defense did not permit sellers to adopt a conspiratorial, industry-wide, multiple-price basing point system on the ground that they were simply meeting the lower prices of competitors using the same system.

This record provides no basis for an equation with *Staley* and *Cement*, in each of which cases this Court expressly found the competitors' prices illegal. Here the Commission persistently declined to find the competitors' prices unlawful.

The remarks of two Justices of this Court, during oral argument on the prior appeal, are significant. Commission counsel had said: "Now, if [the competitors' offers] were illegal offers then, of course, under the *Staley* case Standard had no justification in meeting these illegal offers with another illegal offer." Mr. Justice Jackson then said: "Of course, if they were illegal offers, you would not need to go into the question of good faith." Commission counsel replied: "That is right" (Mimeo. Transcript, p. 72).

Later, Mr. Justice Frankfurter said that this Court could not "be shuttlecocked and battledored by the legal and illegal, because if this is meeting an illegal competition, all we have to do is cite the *Staley* case and then do no more" (Mimeo Transcript, p. 77).

In our *amici* brief to the Commission on remand, we urged the Commission to make a finding as to the legality of the competitors' prices, a request acknowledged only by the two dissenting Commissioners who stated that they were "satisfied that there is nothing in the 8,000 pages of evidence in this record which might cause [us] to suspect that the respondent knew, or that it had reason to believe, that the competitor's lower price, which it was meeting, was or might have been unlawful" (R. 5420).

In later testimony before the House Small Business Committee, one of the *majority* Commissioners, testifying as to this case, stated that the Commission found Standard not in good faith because it discriminated in price while its, "competitors [were] moreover, abiding by the statute."[19]

Lacking any finding of unlawfulness, the Commission, in its Petition for Certiorari, relied heavily upon its 1940 companion complaints against Gulf, Texas and Shell, to support its contention that Standard's competitors used discriminatory pricing systems. While the Commission brief merely suggests illegality, the retailer *amici* flatly state that

[19] Testimony of Stephen Spingarn, Hearings before House Small Business Committee, 84th Cong., 1st Sess. 853 (1955).

the prices of those competitors are "prima facie" unlawful (Brief p. 19).

Yet on April 3, 1957, following the granting of certiorari, the Commission (without publicity) dismissed those complaints. The Commission's brief now seeks to make light of the dismissals by grasping at a press release of June 18, 1957, announcing a *new* investigation into the pricing practices of Shell, Texas and Gulf. Surely the re-investigation and the press release are no more than transparent attempts to shore up the Commission's position before this Court.

The order dismissing those complaints was based upon a motion made in January 1955 by Commission counsel; the Commission waited until April 1957 to dismiss. In those 2½ years the Commission had ample opportunity to reinvestigate the complaints if basis existed.

Whatever the reason for the issuance of the June 1957 press release, the Commission, having dismissed the earlier complaints, is certainly not now reinvestigating 1936-39 pricing practices. And an investigation of *present* pricing practices in the Detroit area could have no bearing upon the legality of the 1936-39 prices involved here.

The issue as to the legality of these three competitors' prices, is, in any event, a smoke screen, for Standard lowered its prices in response to offers from many other competitors as well. There were 20 oil suppliers in the Detroit market. A number of these companies made offers of lower prices to the four jobbers who received Standard's reduced prices. The Commission does not impugn the validity of the prices used by *all* suppliers in the Detroit area and does not question the prices of other than those three suppliers.

Surely, there is *no* basis for attacking the legality of prices of the many suppliers who sell only to tank car buyers, who sell only in intrastate commerce, or who have a legal defense such as cost justification for their lower prices.

C. The Actual Grounds Assigned in the Commission's Decision for Not Finding Good Faith—Now Relegated to a Subsidiary Portion of the Argument—Were All Raised and Rejected in This Court's Prior Decision.

Subsidiary to its pricing-system argument, the Commission argues that the findings that Standard knew or should have known that its price reductions were not cost-justified and would result in an injury to competition, and its finding as to Standard's failure to revise its price scale at the time of the passage of the Robinson-Patman Act in 1936, negative the "good faith" defense. These were, in fact, the major bases for the Commission's rejection of Standard's defense in 1953. The Commission now suggests they simply constitute "another aspect" of that question (Brief, p. 58).

If Standard could have cost-justified its price reductions, or if the Commission had found no injury to competition, the lower price would have been lawful and there would have been no occasion to invoke the "good faith" defense. The court below, as had this Court earlier, pointed out that cost-justification and absence of injury are separate and distinct defenses from the "good faith" defense in 2(b). It noted: "This is the same theory upon which the Commission's previous order was bottomed and which was expressly repudiated by the Supreme Court," 233 F. 2d at 652.

Equally untenable is the Commission's newly improvised argument that Standard "knew or should have known" that its price reductions were not cost-justified and would injure competition, and that this "knowledge" impugned Standard's good faith. (Brief, p. 57)

This Court in *Staley* clearly suggested that such "knowledge" is irrelevant:

> "The statute at least requires the seller who has *knowingly* discriminated in price to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor" 324 U.S. at 759-60 (emphasis added).

Similarly there was nothing improper in the fact that Standard did not revise its prices after 1936. The passage of the Robinson-Patman Act narrowed the good faith defense to *meeting*, but not *undercutting*, competitors' prices. The amended statute, as this Court said in 1951, did not "cut into the actual core of the defense"; Standard still had the self-defensive right to *meet* a lower price offered by a competitor. But Standard *never* undercut the offers of competitors; its price reductions were lawful both before and after 1936. For this reason, as the court below noted, "the mere fact that [Standard] did not change its policy was of little, if any, consequence." 233 F. 2d 649, 653.

D. The Commission Persists in Equating Normal, Hard Competition With Theoretical "Injury" to Competition.

The sole aim of the Commission's complaint and decision (and of the original charges filed with the Commission by the retailers) is the elimination of retail price cutting.[20] The decision will have no such effect.

The Commission can bar Standard's tank-car sales to jobbers, but it cannot bar jobbers from lawfully obtaining the tank-car price from any one of many suppliers.

Unadorned, this is a case about Standard's prices to Ned's.[21] At trial, Commission counsel (now counsel for the retailer *amici*) conceded that "the testimony taken regarding injury to competition centered upon Ned's" (Brief of Counsel prosecuting the complaint, July 12, 1943, p. 29).[22]

But Ned's was a symptom of competition, not a cause of injury.

[20] Cf. Retailers Brief, p. 2.

[21] The Commission found that "there is no evidence that any discount was allowed to purchasers by any retail service station operated by [Wayne and Stikeman]" (R. 5167). The only retail price reductions by Citrin-Kolb were de minimis: 2¢ discount cards offered for three weeks at one station in "1938 or 1939" (R. 5170).

[22] Ironically, while the Commission based its finding of injury largely on Ned's, it concedes Ned's to be an exception to the alleged system it claims precludes a finding of good faith (Brief 42-45).

The Hearing Examiner found that "in the latter part of 1936 and early in 1937 five tank-car customers of the major oil companies" were selling gasoline below the "prevailing retail market price" and this underselling continued in 1937 and 1938 (R. 5113). But four of the five so-called price cutters were supplied by major oil companies other than Standard. And Ned's, the one that was supplied by Standard, did not receive the tank-car (jobber) price from Standard until 1938.

The competitive struggle was intensified by "non-major" retailers. The hearing examiner found that:

> "When the price differential between gasoline of the major and non-major companies was not more than *two cents per gallon*, there was but little or no competition, but that a competitive situation arose when the normal difference in price between the branded and non-branded gasolines rose above two cents per gallon, [and] grew more intensive after the price spread increased" (R. 5180, emphasis added).

The evidence showed, and the examiner found, that non-major gasoline sold *as much as six cents a gallon below* the "prevailing major-brand retail price" (R. 5107). The prices of the Austin and Sunny-Puritan stations, selling Zip and Joy gasolines, were five to six cents a gallon below Ned's prices in 1938 and 1939 (R. 1843-46). The Austin stations sold 20 million gallons of gasoline a year (R. 4377) and the Sunny-Puritan stations over 12 million gallons (R. 4878). In contrast, Standard's largest customer sold only 5 million gallons a year.

To the extent then that retail service stations in the Detroit area were "injured" by Standard's lower price to Ned's—and to permit such an inference it is necessary to define "injury" in a way which equates it simply with hard price competition—Standard's tank-car price was *not* the proximate cause. At all times, Standard was meeting or partially meeting a lower price which competitors were making freely available to their own customers and were offering to Ned's.

Any retailer "injury" flowed not from Standard's prices but from the fact that Ned's and its competitors could freely and lawfully obtain the same prices from competitors of Standard selling branded gasoline of comparable quality and public acceptance, and from non-major competitors selling comparable quality gasoline at appreciably lower prices. Whether or not Standard sold at the lower price was immaterial; Ned's was bound to get the lower price in any event, and so were his competitors.

This Court recognized this fundamental market fact in 1951 when it stated:

> "It must have been obvious to Congress that any price reduction to any dealer may always affect competition at that dealer's level as well as at the dealer's resale level, whether or not the reduction to the dealer is discriminatory. Likewise, it must have been obvious to Congress that any price reductions initiated by a seller's competitor would, if not met by the seller, affect competition at the beneficiary's level or among the beneficiary's customers just as much as if those reductions had been met by the seller" 340 U.S. at 250.

The net effect of the Commission's decision will be a loss to jobbers and a spur to forward vertical integration by oil companies. Price competition at the retail level will continue as virulent as ever.

CONCLUSION

The Commission's decision is no more than an effort to circumvent the 1951 decision of this Court. The impact of the order will be felt primarily by independent gasoline jobbers and not by Standard. Restrictions placed upon jobber operations by the Commission's order will hobble competitive activities by jobbers, will reduce competition among suppliers for jobber business, will, at the least, require unlawful resale price maintenance, and will give impetus to forward vertical integration by major suppliers and to the elimination of independent jobbers.

The legal basis of the Commission's decision urged in this Court is a patent afterthought without support in the

record of this proceeding or in the several earlier Commission decisions.

The Commission's decision will not prevent price cutting at the retail level of competition, the only relief which the complainant retailers seek. Standard's lower prices were not a causal factor of retail price cutting. They were merely a competitive response to lower prices already lawfully available to Standard customers from other suppliers.

We urge that the decision of the Court of Appeals be affirmed, that the Commission's antiquated complaint derived from another economic era be finally dismissed, and that independent gasoline jobbers be freed from the jeopardy which this proceeding has posed for nearly two decades.

Respectfully submitted,

WILLIAM SIMON
ROBERT L. WALD
JOHN BODNER, JR.
1300 Connecticut Avenue
Washington, D. C.

Attorneys for Empire State Petroleum Association

OTIS H. ELLIS
1001 Connecticut Avenue
Washington, D. C.

Attorney for National Oil Jobbers Council, Inc. and Its Member Associations (Appendix A.)

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APPENDIX A

Alabama Petroleum Association, Inc.
Arkansas Independent Oil Marketers Association
Colorado Petroleum Association
Connecticut Petroleum Association
Florida Petroleum Marketers Association, Inc.
Georgia Independent Oilmen's Association
Illinois Petroleum Marketers Association
Independent Oil Men's Association of New England
Indiana Independent Petroleum Association, Inc.
Intermountain Oil Jobbers Association
Iowa Independent Oil Jobbers Association, Inc.
Kentucky Petroleum Marketers Association
Missouri Petroleum Association
Mississippi Oil Jobbers Association
Nebraska Petroleum Marketers Association, Inc.
North Carolina Oil Jobbers Association
Northwest Petroleum Association
Pennsylvania Petroleum Association, Inc.
South Dakota Independent Oilmen's Association
Tennessee Oil Men's Association
Texas Oil Jobbers Association
Virginia Petroleum Jobbers Association
Wisconsin Petroleum Association
Wyoming Oil Jobbers Association